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Paper No. 13

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JUL 23 2003

In re Application of : **OFFICE OF PETITIONS**
George J. Mistic :
Application No. 10/082,818 : **ON PETITION**
Filed: February 25, 2002 :
Attorney Docket No. MR/98-004.C :

This is a decision on the petition under 37 CFR 1.137(a), filed July 10, 2003, to revive the above-identified application.

The petition is dismissed.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)."

This application became abandoned for failure to timely reply to the Office action mailed November 18, 2002. Accordingly, this application became abandoned on February 19, 2003. A Notice of Abandonment was mailed on June 30, 2003.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by:

- (1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;
- (2) The petition fee as set forth in § 1.17(1);

(3) A **showing** to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and

(4) Any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section.

This petition lacks item (3) above.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner asserts that the delay was "due to an unexpected and unforeseen fault in a new docketing system ... the docketing entry for the Office Action to which this petition is directed was somehow corrupted or otherwise rendered incorrect."

Petitioner further "states that: (1) the foregoing error was the cause of the delay at issue; (2) there is, and has been, in place a business routine for performing the function of docketing that could reasonably be relied upon to avoid errors in its performance; and (3) the employees who have responsibility for our docketing system are sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employees represent the exercise of due care."

While petitioner has stated the above, 37 CFR 1.137(a)(3) requires that a showing be made that supports and evidences the statements made by petitioner.

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; (3) and the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See MPEP 711.03(c) (III) (C) (2).

An adequate showing requires statements by all persons with direct knowledge of the circumstances surrounding the delay, setting forth the facts as they know them. Petitioner must supply a thorough explanation of the docketing and call-up system in use and must identify the type of records kept and the person responsible for the maintenance of the system. This showing must include copies of mail ledger, docket sheets, filewrappers and such other records as may exist which would substantiate an error in docketing, and include an indication as to why the system failed in this instance to provide adequate notice that a reply was due. Petitioner must also supply information regarding the training provided to the personnel responsible for the docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks.

Accordingly, the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).

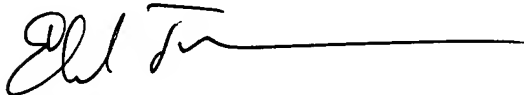
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 Box 1450
 Alexandria, VA 22313

By FAX: (703) 308-6916
 Attn: Office of Petitions

By hand: Office of Petitions
 2201 South Clark Place
 Crystal Plaza 4, Suite 3C23
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Telephone inquiries should be directed to the undersigned at
(703) 306-9200.

A handwritten signature in dark ink, appearing to read 'Ed J. Tannouse', followed by a horizontal line.

Edward J. Tannouse
Petitions Attorney
Office of Petitions
United States Patent and Trademark Office